

LEGAL GUIDANCE

BOILERPLATE AGREEMENTS AND VENDOR OFFERS OF FREE EXTRAS

Perhaps due to the similarities between their missions, the types of personnel they both employ and the kinds of routine and specialized supplies and equipment they use, vendors often fail to recognize that a Naval Medical Treatment Facility (MTF), as an entity of the Federal Government, must conduct its business affairs differently from its civilian counterparts. In marketing their products, vendors often insist that government officials sign a commercial agreement they use with all their non-government customers. They may also make unsolicited offers of "free" supplies, support equipment, maintenance and user training. Again, these offers parallel those the vendors routinely make to civilian organizations. Although these agreements might appear to be innocuous and the offers "good deals for the Navy," both can present legal pitfalls.

All Navy acquisitions, including those for medical supplies, equipment and services, must be conducted following the Federal Acquisition Regulation (FAR) and the implementing DOD and Navy regulations. These rules apply whether the items are purchased or leased. In many cases, they mandate the use of special contract provisions that are drafted to protect the interests of the Government to the maximum extent. Absent special authority, no Navy contracting office can deviate from them. The boilerplate found in a vendor's commercial agreement may be inconsistent with the clauses found in the FAR guidelines. This is often true in the treatment of warranty coverage, risk of loss to vendor-owned equipment and renewals of the agreement itself. Vendor-drafted clauses frequently exclude legal rights and remedies normally reserved to the Government in its contracts, such as the right to terminate the contract for default or the Government's convenience. They also often attempt to apply state laws to the Federal Government.

Few offers for "free" items come with no strings attached. They are most often accompanied by requirements that the MTF commit in advance to the purchase of a

minimum amount or that the MTF purchase related products exclusively from the vendor in question. When the "free" items represent valid needs of the MTF, the safest procedure to take is to purchase or lease them with appropriated funds and to follow strictly all procurement statutes and regulations. The acceptance such vendor offers may circumvent these laws and regulations, give one vendor an unfair competitive advantage over others, and lead to bid protests by other vendors. Signing certain vendor agreements may also constitute an unauthorized commitment made on behalf of the Government or the unauthorized acceptance of a gift to the Navy.

In short, be very cautious when a vendor wants you to sign its standard commercial agreement or makes your activity an offer that appears to be too good to be true. Doubtful cases should be referred to counsel for a legal opinion.

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